United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

JUL 11 1974 74-1366

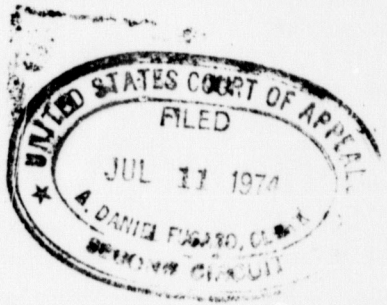
IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

&

NO: 74-1366



JOHN CHARLES FERRANTO, :

Appellant :

vs. :

:

UNITED STATES OF AMERICA, :

:

Appellee :

D/G

Reply Brief

TRAVERSE TO BRIEF FOR THE APPELLEE

The appellee, on petition from Steven Kimelman, Assistant United States Attorney, requested, and was granted an extension of time to file it's Brief and Appendix on June 14, 1974.

In reply, the Assistant United States Attorney on Page 3, of his Brief of Appellee, states:

> "In his papers filed in support of his petition below, Appellant desperately attempts to explain away each of his many prior arrests and convictions. Appellant urges without any supporting evidence, in essence, that (i) there are misstatements in his juvenile record; and (ii) incorrect dispositions as to certain other arrests and convictions..."

In addition on Page 4, Footnote, the Assistant United States Attorney states:

> "In addition, on August 14, 1972, appellant pled guilty to robbery I and was sentenced to a term of 15 years.."

This is completely an erroneous statement and cannot be supported by the record, and this Court should express to the Assistant United States Attorney, the views held in the United States vs. Ott (CA 7, 12/5/73), wherein the Court stated:

"....Of course, every lack of professionalism will not require reversal. But the combination of factors presented by this record demands more than adverse comment. First, the misrepresentation was not made by an attorney for a private party but by the Assistant United States Attorney....."

The appellant is not desperately attempting to explain away each of his prior convictions, he has merely been attempting to disprove a negative, that has been created for him by the Probation Department of the Sentencing Court, and the files of the Federal Bureau of Investigation, that neither the Court, nor the Assistant United States Attorney can truthfully say that they did not relyon the information contained therein in the imposition of the sentence.

The Assitant United States Attorney, again on Page 5, of his Brief for the Appellee states erroneously:

"Finally, appellant and his attorney Ira London, Esq. were given a copy of the presentence report....."

The presentence report might have been given to this Appellant's atterney, Mr. London, but the quoted record that the Assistant United States Attorney selected, shows that any dialogue concerning the pre-sentence report transpired between the Court and the appellant's atterney, and the Appellant could not very well answer the Court when he did not see the report personally. Further, it is the obligation of the defendant's atterney to allocute, and to advise the defendant in circumstances where the proper interpretation of the law is so important. The appellant was not made aware, by either the Court, or his counsel that he had the opportunity to refute any erroneous information contained on the pre-sentence investigation report.

Finally, the Assistant United States Attorney, Page 6, of the Brief for Appellee, states:

> "It is well established in this Circuit, however, that an evidentiary hearing is not required every time a defendant alleges the falsity of statements contained in his presentence report."

The appellant is not contending that it is necessary to conduct an Evidentiary Hearing everytime that a petitioner makes allegations of improper pre-sentence information, however, in the instant case, as in Townsend vs. Burke, 334 U.S. 736, 92 L.Ed. 1690, 68 S. Ct. 1252:

> ".....this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." Id., at 741, 92 L. Ed. at 1693.

Once a petitioner raises the Constitutional invalidity of prior illegally, and unsound presentence information, it becomes the burden of the Government to prove the absence of any Constitutional Defect or waiver of rights---United States vs. Dushane, 435 F. 2d 187, 190 (2nd Cir. 1970).

In the United States vs. Malcolm, (2nd Cir. 1970), 432 F. 2d 809, defendant claimed in his § 2255 motion that he was sentenced on the basis of erroneous information and that the sentencing judge erred in refusing to hear certain evidence aimed at mitigating sentence. This Circuit remanded for resentencing and stated:

"The results of the procedural irregularity is that the sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts. The information which was curtailed and received and considered. Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. Harris vs. United States, 382 U.S. 162, 166, 86 S.Ct. 352, 15 L.Ed. 2d 240 (1965)."

It becomes increasingly clear that the better policy for the Court to follow is to disclose the entire pre-sentence report together with any memoranda upon which it intends to base it's sentence, and to make certain that a defendant is aware that the convictions upon which the sentence is imposed, are valid, by a thorough interrogation of the defendant (not his attorney). The Court has often alluded to audi alteram partem as an ancient and revered principle of justice. If such a principle is to be given meaning, then defendants who faced sentence should not be plagued with unknown accusers. If meaning is to be given to the right of the accused to be confronted by his accysirsm then this right must be present and preserved in all stages of criminal proceedings.

To do otherwise would be to do violence to audi alteram partem, and tarnish the "appearance of justice".

WHEREFORE, the appellant PRAYS that this Court, remand for re-sentencing with a Constitutionally valid pre-sentencing investigation report prepared, one devoid of abstracts, and conclusatory allegations.

Respectfully submitted,

John Ferrante

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Atlanta, Georgia 30315

STATE OF GEORGIA)
: ss
COUNTY OF FULTON)

SWORN TO AND SUBSCRIBED BEFORE ME

THIS ____ DAY OF JULY, 1974.

JUL 8 1974

PAROLE OFFICER

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby certify that I have this date mailed four (4) copies of the attached Traverse to the Clerk of the Court, United States Court of Appeals for the Second Circuit, and one (1) copy to the United States Attorney, David G. Trager, Eastern District of New York, New York, New York, by mailing them in the United States Mails, Certified Mail-Return Receipt requested, on this the 8 day of July, 1974.

John Ferrante

John Ferrante, Appellant Pro Se